

IN THE COURT OF COMMON PLEAS ALLEGHENY COUNTY

TRIAL DIVISION—CRIMINAL

COMMONWEALTH OF PENNSYLVANIA :
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 v. : No. CP-02-CR-
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 JOHN DOE :
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MOTION TO MODIFY SENTENCE

Defendant John Doe, through counsel, hereby moves this Honorable Court to set aside its order revoking Mr. Doe's probation and imposing a new sentence of probation, because the Court is required to inquire into Mr. Doe's financial circumstances and make specific findings that he is able to pay before finding him in violation for failure to make court-ordered payments. In support of his motion, Mr. Doe avers as follows:

I. Background

1. [Background on case and history, including prior probation sentence and conditions]
2. [Explanation of what the alleged probation violations were, what the relevant conditions of probation were (or if they were never specified á la *Foster/Koger*), what the evidence on the record was as it related to payment (specify if the issue was fines, or costs, or restitution), whether the court made any findings on this issue, that probation was revoked, and what the new probation sentence is]
3. [Background on defendant's financial situation. Explain that Mr. Doe would present evidence that (discuss/list income and identify expenses). If his income clearly does not support him, explain how he has housing, transportation, phone and food and other

obligations like child support. Be sure to explain if the defendant has been making a good faith effort to make payments when able, even if the defendant has been unable to pay in full]

II. This Court cannot revoke probation for nonpayment without first finding that the defendant willfully refused to pay.

4. Pennsylvania law does not permit courts to extend the length of probation; instead, a court can only “revoke an order of probation upon proof of the violation of specified conditions of the probation.” 42 Pa.C.S. § 9771(b). At that point, “the sentencing alternatives available to the court shall be the same as were available at the time of initial sentencing,” which includes the authority to impose a new sentence of probation. *Id.*
5. Whenever addressing a technical violation, a court must first find “‘wilful or flagrant disrespect’ for the terms of probation on the part of the defendants” to revoke probation. *Commonwealth v. Heilman*, 876 A.2d 1021, 1027 (Pa. Super. Ct. 2005) (court could not revoke probation for failure to attend treatment where there was no evidence of willful noncompliance) (quoting *Commonwealth v. Ballard*, 814 A.2d 1242, 1246 (Pa. Super. Ct. 2003)).
6. The general requirement that a technical violation be willful applies equally to revocation for nonpayment. “A court cannot revoke probation or parole for non-payment of fines, costs or restitution absent a determination that the failure to pay is willful or that the probationer made insufficient bona fide efforts to acquire the resources to pay and is not merely the result of inability to pay.” *Commonwealth v. Marshall*, No. 558 WDA 2022, 2023 WL 5097263, at *2 (Pa. Super. Ct. Aug. 9, 2023) (unpublished). *See also Commonwealth ex rel. Powell v. Rosenberry*, 645 A.2d 1328, 1331 (Pa. Super. Ct. 1994) (only the “willful refusal to pay” a financial obligation “may be considered a technical”

violation for which probation or parole may be revoked); *Commonwealth v. Dorsey*, 476 A.2d 1308, 1311–12 (Pa. Super. Ct. 1984) (answering for the first time “whether parole or probation may be revoked for less than willful conduct” for nonpayment and concluding that there must be such a finding).

7. The Commonwealth bears the burden to “prove by a preponderance of the evidence a violation,” which includes the burden to prove that the defendant willfully refused to pay. *Dorsey*, 476 A.2d at 1311. *See also Miller v. Bd. of Prob. and Parole*, 784 A.2d 246, 248 (Pa. Commw. Ct. 2001) (Commonwealth must prove that a parolee failed to make “bona fide efforts” to pay to prove a violation for nonpayment).
8. To ensure that a defendant’s probation is not erroneously revoked, precedent also places an affirmative obligation on this Court to inquire into the reasons for nonpayment. Even when a defendant facing revocation did not “offer any evidence concerning his indigency,” the trial court nevertheless acts unlawfully if it does “not inquire into the reasons for appellant’s failure to pay [n]or . . . make[s] any findings pertaining to the willfulness.” *Dorsey*, 476 A.2d at 1312. Accordingly, a revocation hearing “should include an inquiry into the reasons surrounding the probationer’s failure to pay, followed by a determination of whether the probationer made a willful choice not to pay, as prescribed by *Dorsey*.” *Commonwealth v. Eggers*, 742 A.2d 174, 176 (Pa. Super. Ct. 1999).
9. In this context, willfulness “means an intentional, designed act and one without justifiable excuse.” *Commonwealth ex rel. Wright v. Hendrick*, 312 A.2d 402, 404 (Pa. 1973). Thus, when the only evidence is that a person is “penniless and unable, through no fault of his own, to pay any sum on the delinquencies,” he has not willfully failed to pay. *Id.* *See also*

Commonwealth v. Diaz, 191 A.3d 850, 866 n.24 (Pa. Super. Ct. 2018) (“A finding of indigency would appear to preclude any determination that Appellant’s failure to pay . . . was willful.”).

10. The well-established requirement that probation cannot be revoked for less than willful conduct applies even when the sentence is probation rather than incarceration. In *Marshall*, 2023 WL 5097263, at *3, the Superior Court found that the probation revocation was illegal where the trial court never considered ability to pay and imposed a new sentence of probation. Similarly, in *Rosenberry*, the defendant’s parole was illegally revoked and extended without determining that he had willfully refused to pay. *Rosenberry*, 645 A.2d at 1330–31. The defendant was later incarcerated for an unrelated parole violation during the illegally extended parole period—and when the Superior Court ruled in his favor, it did so because the original revocation and extension of his parole period was illegal, not because of the subsequent incarceration for an unrelated violation. *Id.*
11. At the *Gagnon II* hearing in this matter, the Court did not hear evidence concerning **Mr. Doe’s** ability to pay, or make findings on that issue. The order revoking **Mr. Doe’s** probation is therefore unlawful.

III. Punishing **Mr. Doe for failure to pay in the absence of evidence and a finding that **he** could pay violates the Fourteenth Amendment.**

12. In *Bearden v. Georgia*, 461 U.S. 660, 672 (1983), the U.S. Supreme Court held that a court cannot punish a probationer for failure to make court-ordered payments in the absence of evidence that the failure was willful. Whereas the Pennsylvania cases on this point focus on whether any violation has occurred, *Bearden* is concerned with the punishment. To avoid “punishing a person for his poverty,” *Bearden*, 461 U.S. at 671, the

U.S. Supreme Court held that a trial court must inquire into the reasons for nonpayment, make findings on the record, and consider other sentencing alternatives if the defendant's nonpayment is not willful. *Id.* at 672. To do otherwise would "violate the fundamental fairness guaranteed to defendants under the Fourteenth Amendment." *Marshall*, 2023 WL 5097263 at *2.

13. By imposing additional punishment in the form of probation on Mr. Doe because he is too poor to pay the financial obligations, the Court has violated the Fourteenth Amendment and the requirements of *Bearden*. Again, that the punishment was probation and not incarceration is irrelevant. *See Marshall*, 2023 WL 5097263 at *2. In *Mayer v. Chicago*, one of the precursors in the line leading to *Bearden*, the Court explicitly rejected the argument that the constitutional protections afforded by the Fourteenth Amendment turn on whether the defendant faces incarceration: the "invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed." 404 U.S. 189, 197 (1971). In other words, nothing in the Fourteenth Amendment or the U.S. Supreme Court's interpretation thereof actually draws the line for constitutional protections based on whether a defendant faces incarceration or additional probation.
14. Accordingly, by increasing the amount of punishment imposed on Mr. Doe by virtue of his inability to pay, the sentence that the Court imposed is unconstitutional.

IV. Even though there were other grounds for revocation of probation, the Court could not revoke for nonpayment without making the requisite findings.

15. Although there were other alleged probation violations for which this Court could have revoked Mr. Doe's probation and resentenced him, the Court was still required to comply with the willfulness standard set forth above, because one of the reasons for revocation

and sentencing was nonpayment. The failure to do so was unlawful. *See Commonwealth v. Cooper*, No. 2495 EDA 2019, 2020 WL 4218861, at *2 (Pa. Super. Ct. July 23, 2020) (unpublished) (“Appellant stipulated to multiple violations of his parole in addition to his failure to pay his financial obligations, all of which the court took into consideration in resentencing Appellant. . . . We nevertheless agree that to the extent Appellant's failure to pay his financial obligations factored into the court's reasoning in any way, Appellant was entitled to an ability-to-pay hearing.”); *Commonwealth v. Keeno*, No. 1763 WDA 2019, 2020 WL 2571191, at *2 (Pa. Super. Ct. May 21, 2020) (unpublished) (“Furthermore, Appellant's nonpayment of financial obligations was one of three reasons articulated by the trial court for revoking his parole. Consequently, after the trial court determines whether Appellant was able or unable to pay his financial obligations, it must then re-evaluate its decision to revoke Appellant's parole – e.g., if the court concludes that Appellant did not have sufficient financial resources, it must then analyze whether the other two violations that it found were enough in combination to support revocation of Appellant's parole.”).

16. Because the Court did not consider **Mr. Doe's** ability to pay, and because nonpayment was one of the reasons for which revocation was revoked and **Mr. Doe** was resentenced, the Court must hold a new *Gagnon II* hearing. *See, e.g., Keeno*, 2020 WL 2571191 at *2 (when revocation is based on an unlawful reason, the trial court “must then re-evaluate its decision to revoke” probation).

V. Revocation was improper because payment was never made a specific condition of probation by the Court.

17. The Court never specified that payment on a **set** schedule was a probation condition with which **Mr. Doe** must comply. Yet probation can only be revoked “upon proof of the

violation of **specified conditions** of the probation.” *Commonwealth v. Foster*, 214 A.3d 1240, 1250 (Pa. 2019) (quoting 42 Pa.C.S. § 9771(b)). “In other words, a court may find a defendant in violation of probation only if the defendant has violated one of the ‘specific conditions’ of probation included *in the probation order* or has committed a new crime. The plain language of the statute does not allow for any other result.” *Foster*, 214 A.3d at 1250 (emphasis added).

18. Under *Foster*, the probation department may not impose its own conditions to require payment, either in full or on a specific schedule. Instead, the only binding conditions for which **Mr. Doe** may actually face revocation proceedings are those that the trial court specified “at the time of his initial sentencing.” *Commonwealth v. Koger*, 255 A.3d 1285, 1290 (Pa. Super. Ct. 2021), *reversed on other grounds*, 295 A.3d 699 (Pa. 2023). The Superior Court has explained that “a sentencing court may not delegate its statutorily proscribed duties to probation and parole offices and is required to communicate any conditions of probation or parole as a prerequisite to violating any such condition.” *Id.* at 1291.

19. That did not occur here, as the Court never specified payment as a condition of probation in its sentencing order. As a result, there was no legal basis on which to revoke **Mr. Doe’s** probation for nonpayment.

VI. Revocation on the basis of nonpayment of court costs was unlawful as the payment of court costs is never a valid condition of probation.

20. Requiring that a defendant pay court costs—as opposed to fines or restitution—is never a valid condition of probation. The Superior Court has explained that costs “are not part of the criminal’s sentence but are merely incident to the judgment.” *Commonwealth v. Rivera*, 95 A.3d 913, 917 (Pa. Super. Ct. 2014). As a result, an order to pay costs is “not

‘reasonably related to the rehabilitation of the defendant’” under 42 Pa.C.S. § 9763(b).¹ *Id.* See also *Commonwealth v. Hudson*, 231 A.3d 974, 980-81 (Pa. Super. Ct. 2020) (“It is clear from our reading of *Rivera* that court costs do not reasonably relate to the rehabilitation that probation is designed to foster, and thus, cannot be subsumed within the catchall provision of Section [9763] . . . Section [9763] does not authorize the imposition of court costs as a condition of probation”). This is in contrast to fines and restitution, as Section 9763 specifically permits courts to make payment of those financial obligations a condition of probation.

21. Since **Mr. Doe** did not “violate[] a specific condition of probation” by not paying costs, “the trial court erred in revoking [**Mr. Doe’s**] probation,” and the revocation must be set aside. *Hudson*, 231 A.3d at 981.

WHEREFORE, **Mr. Doe** requests that this Court vacate its sentencing order and hold a new *Gagnon II* hearing.

[SIGNATURE BLOCK]

¹ Since *Rivera* and *Hudson* were decided, the relevant provisions that both decisions cite from 42 Pa.C.S. § 9754 have moved to Section 9763.